

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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3	MICHAEL SCOTT BRUMBACK, an) Case No. 1:22-CV-03093-MKD
4	individual; and GIMME GUNS, a)
5	sole proprietorship,) November 23, 2022; 11:09 am
6)
7	Plaintiffs,) Yakima, Washington/
8) Videoconference
9	v.)
10) Motion for Injunctive and
11	ROBERT W. FERGUSON, in his) Declaratory Relief Hearing
12	official capacity as Washington)
13	State Attorney General; JOHN R.)
14	BATISTE, in his official) Pages 1 to 53
15	capacity as Chief of the)
16	Washington State Patrol; ROBERT)
17	UDELL, in his official capacity)
18	as Sheriff for Yakima County,)
19	Washington; and JOSEPH A.)
20	BRUSIC, in his official capacity)
21	as County Prosecutor for Yakima)
22	County,)
23)
24	Defendants,)
25)
	ALLIANCE FOR GUN RESPONSIBILITY,)
)
	<u>Intervenor-Defendant.</u>)

BEFORE THE HONORABLE MARY K. DIMKE
UNITED STATES DISTRICT COURT JUDGE

Official Court Reporter: Marilynn S. McMartin, CCR #2515
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Yakima, Washington 98907
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11:09:55

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1 (November 23, 2022; 11:09 am)

2 THE COURTROOM DEPUTY: The matter before the court is
3 *Michael Scott Brumback; et al., v. Robert Ferguson; et al.*,
4 Cause No. 1:22-CV-3093-MKD, time set for motion hearing.

11:10:12 5 Counsel, please state your presence for the record. And
6 we'll begin with plaintiffs' counsel, and then we will do
7 counsel that is here in person, and then we will go to counsel
8 on Zoom and we will begin with Mr. Hatcher.

9 MR. HATCHER: Austin Hatcher, plaintiff, also with the
11:10:38 10 Silent Majority Foundation.

11 MR. SERRANO: Pete Serrano on behalf of plaintiffs,
12 Silent Majority Foundation.

13 THE COURT: All right. Good morning to counsel for
14 plaintiffs.

11:10:48 15 MS. CASTILLO: Callie Castillo on behalf of the
16 defendants Robert Udell and Joseph Brusic.

17 THE COURT: Good morning.

18 All right. Counsel on video for the State defendants.

19 MS. SIMPSON: July Simpson on behalf of the Washington
11:11:07 20 State defendants.

21 MS. BENESKI: Kristin Beneski for the State defendants.

22 MR. HUGHES: Good morning, Your Honor. Andrew Hughes
23 for the State defendants.

24 THE COURT: All right. Good morning to counsel.

11:11:18 25 And then those on behalf of Alliance for Gun

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1 Responsibility?

2 MR. PEKELIS: Good morning, Your Honor. Zach Pekelis
3 for Intervenor-Defendant, Alliance for Gun Responsibility.

4 THE COURT: Good morning.

11:11:32 5 All right. Today we're here on plaintiffs' motion for
6 preliminary injunction related to the statute. I intend to hear
7 first from plaintiff. I'll give everyone an opportunity to be
8 heard, and then I'll hear from the plaintiff again unless
9 there's issues that require additional argument. So we'll begin
11:11:49 10 with counsel for plaintiff.

11 MR. SERRANO: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. SERRANO: May it please the court, Pete Serrano on
14 behalf of plaintiffs, Mr. Brumback and Gimme Guns. We're here,
11:12:08 15 as you mentioned, on a preliminary injunction motion. This is a
16 pretty straightforward case and question that's before the
17 court.

18 The question that we're addressing today -- and I'd like
19 to pause for one second to say I am extremely grateful that
11:12:21 20 we're here this day before Thanksgiving; that we have the
21 opportunity to litigate these important constitutional issues.

22 So we are founded on the Constitution. We are a great
23 nation of laws. And today we're here to address one of those
24 laws, which is does the -- the question before the court is
11:12:36 25 whether or not the Second Amendment of the United States

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1 Constitution and whether or not Article I, Section 24 of the
2 Washington State Constitution protect the ability to
3 manufacture, to distribute, to sell or offer for sales magazines
4 that are deemed by the legislature as large-capacity magazines,
5 meaning they hold more than 10 rounds.

11:12:59

6 Under the Washington Constitution, the right of an
7 individual citizen to bear arms in defense of himself, or the
8 state, shall not be impaired.

9 Under the United States Constitution, under the Second
10 Amendment, the issue is whether or not -- is that a
11 well-regulated militia, being necessary for the security of a
12 free state, the right of the people to bear and keep arms, shall
13 not be infringed.

11:13:15

14 So here we have a question of whether or not this type
15 of regulation under Senate Bill 5078 and its impending -- and
16 its adoption of modifications to Revised Code of Washington
17 9.41, again, which prohibit the manufacture, distribution,
18 sales, or offering for sale of these 10-round magazines,
19 infringe or impair these rights.

11:13:30

20 Under the United States Supreme Court's decision in the
21 *Bruen* case this year, we found that when the Second Amendment's
22 plain text covers an individual's conduct, the Constitution
23 presumptively protects that conduct. So when the constitutional
24 language protects the conduct, the Constitution presumptively
25 protects that conduct.

11:13:52

11:14:16

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1 And when such a finding is made to justify the
2 regulation, the State must demonstrate that its regulation is
3 consistent with the nation's historical tradition of firearms
4 regulation. Here, no such offering's been made. There is no
11:14:32 5 fair or adequate firearms regulation history, not under the
6 Constitution. And the limited information that's been provided
7 by the State as well as the intervenors is recent history at
8 best.

9 For example, there were citations to a 1994 firearms ban
11:14:54 10 that occurred through the United States. When you look at the
11 *Bruen* analysis, *Bruen* was very clear that post-ratification
12 history of constitutional texts and analysis is sketchy at best.

13 The court specifically stated -- and I'll cite to the
14 court here -- that post-Civil War discussions of the right to
11:15:18 15 keep and bear arms that took place 75 years after the
16 ratification of the Second Amendment do not provide as much
17 insight into its original meaning as earlier sources.

18 And then it further stated that regulations that are
19 historically consistent with the nation's tradition of firearm
11:15:39 20 regulations, specifically anything -- late-19th-century evidence
21 cannot provide much insight into the meaning of the Second
22 Amendment when it contradicts earlier evidence.

23 Again, the evidence presented by the State and the
24 intervenors were from Tommy guns, machine guns that occurred in
11:15:58 25 the Prohibition era of the 1920s, over 150 years after the

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1 ratification -- or nearly 150 years after the ratification of
2 the Second Amendment; also citing to, again, a 1994 which was
3 203 years after the ratification of the Second Amendment.

4 So we're not talking, you know, post-Civil, Civil War.
11:16:16 5 We're talking 20th century and near 21st century regulations
6 that address these types of, these types of magazines and the
7 weapons that utilize them.

8 So, again, looking at the *Bruen* analysis, the simple
9 fact is we're looking at, as *Bruen* stated, we have a modern-day
11:16:37 10 question. And the Second Amendment protects modern-day firearms
11 equally as the First Amendment protects free speech Internet
12 based as well as the Fourth Amendment protects search and
13 seizures that are utilizing newer technologies.

14 And *Bruen* was very clear on that. Again, it's not a
11:16:58 15 snapshot. It's not a prospective looking. We look at the
16 history and the tradition of the regulation of firearms under
17 the Second Amendment, and where no such history exists or it's
18 limited and it's newer in its face, that doesn't bear the same
19 weight as historical actual regulation.

11:17:17 20 And there are a handful of elements here, as we know;
21 that under a preliminary injunction there are four elements:
22 the likelihood of success, the irreparable harm, and then the
23 question of the balance of the harm to the individuals who are
24 challenging the regulation as well as the public good.

11:17:33 25 And when a government regulation's challenged, those

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1 last two factors are combined into a third factor, so
2 fundamentally we have the question of whether or not there's a
3 potential success on the -- a likelihood of success on the
4 merits.

11:17:46 5 Because this is a constitutional question that impacts a
6 fundamental right, the likelihood of success is extremely high
7 here. Moreover, the irreparable harm, as many courts have held,
8 is also -- it's natural when a constitutional right is infringed
9 that irreparable harm's immediate. And I'll address these
11:18:05 10 issues as well as the third, combined factors here.

11 As I mentioned and *Bruen* noted, that just as the First
12 Amendment protects modern-day free speech and the Fourth
13 Amendment protects against modern-day searches and seizures, so
14 does the Second Amendment protect against modern-day weapons.

11:18:23 15 There are a couple of really important cases that have
16 come both out of the United States Supreme Court and various
17 courts of appeals, including the Ninth Circuit as well as other
18 sister district courts in Southern and Northern California.

19 That would be the *Fyock v. Sunnyvale* case, which
11:18:38 20 addressed actual banning of magazines, and the court found that
21 magazines having the capacity to accept more than 10 rounds are
22 in common use and are therefore not dangerous, unusual.

23 Again, I think it's critical that the court used the
24 term that it finds -- that it found. This wasn't just something
11:18:58 25 in dicta. If a court states "we find," that's -- the court is

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1 actually issuing some type of factual or legal basis.

2 So the important thing that *Sunnyvale* relied on was the
3 fact that 40 percent -- 47 percent of all magazines were of this
4 type, that it held more than 10 rounds of magazines, 10 rounds
5 of ammunition.

6 So in looking to *Fyock* -- again, that's out of the
7 Northern District of California, it's about a decade old -- it
8 also further stated that no court has found that such magazines
9 do not qualify as arms under the Second Amendment.

10 Again, these are really critical factual findings and
11 decisions by the court because they offer protection, you know.
12 The claims that we've seen are that these aren't arms. No. In
13 fact, courts have determined that -- starting with *Heller* --
14 that the ammunition itself, that the magazines constitute arms.

15 You know, I love some of these cases that came out of
16 the Ninth Circuit. For example, you know, in *McDougall v.*
17 *County of Ventura* -- and we cited to that in our reply brief --
18 a complete ban on the ability to acquire arms and ammunition and
19 the closure of all firing ranges renders the right to keep and
20 bear arms hardly worth the paper it's consumed.

21 THE COURT: But this is different, at least according to
22 the defense's evidence. They're drawing a distinction between
23 magazines that hold less than 10 or more than 10, and under
24 their -- the evidence that they proffered, at least, that there
25 is no firearm that would not operate with a magazine containing

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1 10 rounds of ammunition or less.

2 So it doesn't -- the regulation does not render any
3 firearm inoperable which is, I think, different than the
4 situation that you're presenting when you're talking about
11:20:56 5 closing down firing ranges and things like that; that that is
6 something that would render firearms unable to be used. Isn't,
7 isn't there a distinction there, and how should the court treat
8 that distinction?

9 MR. SERRANO: I'd say that there is a distinction, but,
11:21:09 10 you know, when you look at the broad swath of the Second
11 Amendment and the Washington Constitution, it's very clear that
12 the right to bear arms is to not be infringed or impaired.

13 You know, infringement, as we addressed, is any type of
14 regulation that limits your ability to use. It's not whether or
11:21:25 15 not it renders it inoperable. It's whether or not it limits or
16 inhibits the utilization of such. So whether or not it's a
17 6-round magazine, a 24-round, a 30-round, whatever the number
18 is, the limitation placed on the ability to use one's firearm in
19 one's defense has been upheld for years long.

11:21:45 20 Again, in looking at whether or not there's a
21 constitutional history of regulating these types of magazines
22 that it's been clear, *Heller* held that these constitute arms.
23 *Fyock* has rendered these as arms. The common use of these is
24 what the court has consistently relied upon to determine that
11:22:07 25 these are arms. So the limitation on these magazines therefore

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1 impacts the rights -- one's right to bear arms and to keep and
2 maintain those arms in one's self-defense.

3 THE COURT: With respect to evaluating dangerousness --
4 because I think the Supreme Court both in *Heller* and *Bruen*
11:22:24 5 recognized that there is the ability to regulate firearms that
6 are dangerous or military style -- what is your position on what
7 the court should look to to make that determination?

8 MR. SERRANO: I think, quite frankly, it goes beyond the
9 scope of a question. In looking at dangerousness, you know,
11:22:45 10 there are folks who carry firearms, handguns. You know, I
11 personally have one that's got 15 rounds and 18 rounds. I do
12 that in a manner of self-defense.

13 The ability to declare this as dangerous -- again,
14 they're not unusual. They're commonplace. As we saw in *Heller*,
11:23:05 15 it indicated that there are, I think it was 14 million of these
16 magazines, and then there's another case in *Fyock* that addresses
17 it as 39 million of these types of magazines that are in place.

18 We cited to another statistical analysis, the National
19 Firearms Survey -- this was in the complaint at paragraph 45 --
11:23:29 20 that estimates that 81.4 million Americans own these types of
21 magazines.

22 So, again, looking at the common usage, I think that
23 then goes to the question of whether or not these are
24 specifically dangerous. It's, a firearm is -- unquestionably
11:23:43 25 promotes -- or, no, not "promotes" -- has the opportunity or

13

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1 ability to injure a person.

2 But when you look at it, there's no question that when --
3 the information that we provided, you know, there were about 179
4 deaths due to homicides -- right? -- due to firearms in the
11:24:01 5 state of Washington, yet 517 vehicular deaths.

6 We don't regulate the size of the engine of the car or
7 its weight or its gross vehicle weight or whether or not it has
8 all-traction tires to say that a specific vehicle is dangerous
9 and another vehicle's not.

11:24:17 10 I find it ironic that the State here posits that these
11 are dangerous, yet that same state legislature passed several
12 bills over the past several years to allow for the utilization
13 of what they're terming recreational drugs, and there were 1789
14 drug overdose deaths, which is almost tenfold in 2019 the
11:24:41 15 homicides that occurred from guns.

16 So to claim that it's regulating something dangerous, I
17 think the legislature has absolutely failed in that argument,
18 and whether or not the State can recover, I don't know.

19 But at a minimum, insofar as we're talking about
11:24:54 20 dangerous, I see that -- I don't believe that's a fair argument.
21 I believe, if anything -- and *Heller* was very clear about that,
22 that these aren't dangerous because they are in common use, and
23 they're commonly deployed for self-defense.

24 THE COURT: Well, I think under *Heller* and *Bruen*, the
11:25:12 25 court has recognized that certain issues related to certain

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1 dangerous firearms -- Tommy guns is the regular example -- can
2 be regulated. And so my question to you is: What should the
3 court look to to make the evaluation of whether large-capacity
4 magazines fall into a dangerousness category, such as a Tommy
11:25:32 5 gun, or a nondangerous, that it doesn't fall into that category?
6 What is the plaintiffs' position that courts should look to to
7 make that evaluation?

8 MR. SERRANO: Well, again, I think when you look at the
9 actual impact -- right? -- the fact that if there are 81.4
11:25:47 10 million or more of these types of magazines out and there are,
11 albeit hundreds of actual instances where these implements are
12 utilized to carry out evil, I think that's a disproportionate
13 number.

14 I mean, people are -- you know, again, I want to turn
11:26:06 15 back to those homicides, the 197 that are cited from 2019 in
16 Gun. It doesn't address the caliber. It doesn't address the
17 magazine capacity. So to claim that having more ammunition is
18 in and of itself dangerous I think actually misses the point.

19 Certainly -- again, I look at Mr. Brumback. We brought
11:26:27 20 him because he's carried firearms for quite some time. I don't
21 need to date him, but, you know, he's carried firearms and
22 utilized them in self-defense for quite some time, yet, you
23 know, he's not utilized them in an offensive mechanism.

24 The dangerousness question to me strays into the
11:26:46 25 individual's intent. It strays into the individual's personal

1 capacity, not whether or not the individual can fire 15 rounds
2 or five.

3 So in looking at that, you know, again, just -- I think
4 simply put, going back to *Heller* it says, you know, we think it
11:27:04 5 clear enough in the record that semiautomatic rifles and
6 magazines holding more than 10 rounds are, indeed, in common
7 use, as the plaintiffs contend.

8 You know, I look at these, and the courts consistently
9 go to is this commonly used in a self-defense way, and there's
11:27:21 10 no question that it is. You know, as I mentioned in our
11 complaint at page -- or paragraph 45, we cite to the National
12 Firearms Survey which talks about the number of magazines, the
13 81.4 million that hold greater than 10 rounds.

14 Digging deeper into that -- and I'm happy to brief up on
11:27:41 15 this -- it talks about the number of utilizations for
16 self-defense of these types of magazines.

17 And now, of course -- and this is where I think we go a
18 bit astray -- when we look at -- backwards looking, historical
19 analysis, we're gonna have individuals -- and I think it was the
11:28:01 20 State's expert, Mr. Cornell, that addressed this and said that,
21 you know, fundamentally when we have these experts testifying,
22 they're gonna have a cause. You know, they're gonna -- they're
23 positing. It's fundamentally their own opinion on this; right?

24 When we have this research that's conducted, we look at
11:28:20 25 whether or not these people can actually provide us an unbiased

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1 statement. And, again, the ownership of at least 81 million of
2 these magazines, and looking at the number of actual incidents
3 where they're utilized for the wrong or for bad as compared to
4 where they're used in self-defense -- which is what the
5 Constitution protects.

6 You know, I want to be clear. We're not here arguing
7 that anyone and everyone should have the right to own this for
8 any purpose. The Constitution protects the right of one's
9 self-defense, and the state Constitution protects that right for
10 the individual to protect themselves and the state.

11 So when these, these magazines are utilized in their
12 proper purpose, I believe they're constitutionally protected.
13 And to claim the absolute danger, I think it misplaced -- it
14 misplaces the argument.

15 I'm just trying to think. You know, again, looking at
16 our reply, on pages 8 and 9 we address the common use of these,
17 and, again, this really goes into the irreparable harm. When
18 you're infringing on an individual's constitutional right -- and
19 this is, this is longstanding caselaw from *Elrod*, and then it's
20 been extended to Second Amendment context -- when you infringe
21 on the individual's individual right, that is immediate
22 irreparable harm.

23 Again, back at our reply brief it looks at -- you know,
24 the Seventh Circuit in *Friedman* talks about the evidentiary
25 record is unequivocal: a statistically significant amount of

17

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1 gun owners such as Friedman use semiautomatic weapons and
2 high-capacity magazines for lawful purposes.

3 I don't think anyone's placed before the court any
4 argument that high-capacity magazines are exclusively used for
11:30:09 5 nefarious purposes. I certainly would welcome that briefing.

6 Again, Mr. Brumback, our other expert, and Gimme Guns,
7 our other plaintiff, have all stated that they have these.
8 Gimme Guns transfers these to on-duty and off-duty police
9 officers. Not to say that police officers can't do bad things
11:30:32 10 but, again, very clearly, these serve a purpose. These
11 magazines serve a purpose, and that purpose is for the
12 individual's self-defense as well as the defense of one's own
13 country and one's own, one's own state.

14 So with that -- and I apologize. I'm not tracking time.
11:30:51 15 I know we kind of limited it to 15 minutes. I'm not sure --

16 THE COURT: I have nothing else scheduled the rest of
17 the day, so I am not going to keep you to a 15-minute clock.

18 MR. SERRANO: Okay. Okay.

19 THE COURT: I didn't, I didn't mean that to say that you
11:31:02 20 should take the next two hours --

21 MR. SERRANO: No, no, no, no.

22 THE COURT: -- but I am not -- I do not have a clock
23 running today.

24 MR. SERRANO: Okay. No. I just -- you know, I wanted
11:31:09 25 to be aware. And, you know, it still is Thanksgiving Eve even

1 though we're here; right?

2 THE COURT: We're open till 5:00.

3 MR. SERRANO: So again, you know -- have I answered that
4 question sufficiently or would you like me to address that a
11:31:24 5 little bit more?

6 THE COURT: No. That's fine.

7 MR. SERRANO: Okay. So, again, in looking at the four
8 elements of the injunctive relief, the actual injury here is
9 infringing or impairing this constitutional right. And, again,
11:31:38 10 that starts from almost 50 years of Supreme Court precedent,
11 *Elrod*, that was related to a First Amendment case, but it's been
12 extended to the Second Amendment.

13 And that actually came out of -- that was cited in *Jones*
14 *v. Bonta*, and we've got that in our reply brief at 10 and
11:31:58 15 footnote 4 -- *Jones v. Bonta* and *Duncan v. Becerra*, which are
16 both Ninth Circuit and Southern District of California cases.

17 So when any constitutional right is infringed or
18 impaired, you know, that is the irreparable harm. And, again,
19 here limiting the ability to utilize one's own arms, if you
11:32:14 20 will, in self-defense is a constitutional infringement. And
21 then --

22 THE COURT: Here in this particular case, your client,
23 the plaintiff, already owns magazines that are at issue, and the
24 statute at issue does not prohibit the use of -- the use or
11:32:32 25 possession of those. So what is the harm in denying an

19

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1 injunction pending the outcome of this given that he has access
2 to the very items at issue and there's no prohibition on his
3 utilization or possession of those?

4 MR. SERRANO: So I'd say it's twofold. One is the
11:32:51 5 ability to acquire more, and the caselaw on that has kind of
6 bounced around. I believe it was *McDougall* that indicated that
7 owning a second gun wasn't tantamount to procuring a first one;
8 right?

9 Nonetheless, *McDougall* also held that an 11-day wait on
11:33:07 10 receiving a firearm was unconstitutional, because that
11 limitation of the ability to bear and carry one's arms in
12 self-defense wasn't in and of itself a limitation. So there's
13 the ability to acquire more.

14 Then there's also the inability, and Mr. -- you know,
11:33:29 15 our plaintiff Gimme Guns, Mr. Gilroy, indicated that his
16 inability to sell not just the magazines but the guns themselves
17 that accompany some of these magazines.

18 For example, you see a lot of the AR-style rifles,
19 sporting rifles that can be used in home defense. Those guns
11:33:48 20 are -- actually, the manufacturer's not sending them here, so
21 there's the inability to acquire a firearm in and of itself, not
22 just the magazine.

23 So there's the inability to acquire and utilize on
24 behalf of oneself and on behalf of one's state the additional or
11:34:07 25 an actual new firearm. And so that certainly's prohibitive

20

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1 because, again, in looking at the plaintiffs, we intentionally
2 brought both Mr. Brumback, who has experience using these -- as
3 someone who owns guns it's, you know, I'd say an enthusiast to
4 a degree -- and then we brought the company that was selling
11:34:27 5 these. And certainly the prohibition of selling them has,
6 unquestionably, impacted Gimme Guns.

7 THE COURT: But hasn't the Ninth Circuit said economic
8 harm in the commercial context is not -- can't be irreparable
9 harm or injury pending a preliminary injunction?

11:34:46 10 MR. SERRANO: So there's the economic harm element, but
11 there's also, again, just simply prohibiting the ability to sell
12 the guns that accompany these magazines.

13 And, again, that fundamentally is prohibiting the
14 ability for any individual to obtain a firearm that would
11:35:01 15 otherwise be, you know, free floating, if you will, that would
16 be protected under the Second Amendment right. So it's not
17 simply the economic harm. It's the infringement on the ability
18 for an individual to sell or transfer.

19 Again, in this case, Mr. Gilroy, Gimme Guns, has the
11:35:19 20 ability to transfer -- well, prior to July 1 had the ability to
21 sell or transfer, market these. He's no longer -- he's lost
22 that ability. And, again, it's not simply the magazines, but
23 there are manufacturers who're no longer offering the actual
24 firearms themselves for future sale -- right? -- for
11:35:39 25 distribution throughout the state of Washington.

21

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1 And we've had that experience where he just has not had
2 the ability to sell a firearm because it traditionally comes
3 with, say, a 30-round magazine, and it's just not offered for
4 sale here.

11:35:58

5 So kind of dovetailing into that fourth element of
6 protecting the public interest, because this is against the
7 government, that dovetails into the third question of the
8 irreparable harm.

11:36:18

9 But, again, I want to go back to *Fyock* which states --
10 well, again, there are a couple elements in *Martinez v.*
11 *Villanueva*, so I actually miscited that case. That was the one
12 on the 11-day ban where it stated that the inability to practice
13 with firearms at a firing range or acquire firearms and
14 ammunitions for 11 days severely burdened the core of the Second
15 Amendment. And that is a Ninth Circuit case, and it's from this
16 year. And then any infringement on the Second Amendment
17 naturally harms the public. That comes from *Fyock*.

11:36:39

18 And so, again, what we're looking at is not just an
19 economic harm question. It's whether or not the Second
20 Amendment has been infringed on these individuals. And in so
21 viewing it, just -- again, *McDougall* was very clear: Denying
22 the ability to acquire firearms and ammunition at all, at all,
23 is fundamentally different from waiting a short time to receive
24 an additional firearm.

11:36:57

11:37:15

25 Again, here we have the inability to obtain these

22

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1 magazines and in some cases the firearms that accompany them.
2 It's an all-out prohibition. So under the McDonald standard --
3 or *McDougall* standard -- excuse me -- that denial is -- it's a
4 fundamental violation of that right, and that harms the public.
11:37:36 5 That was the conclusion there. It wasn't just that it harmed
6 the individual, but it harmed the public.

7 Let me just -- I do want to be mindful of your time
8 while we're here till -- you're here till 5:00.

9 You know, again, just simply put, these, these are not
11:37:57 10 extraordinary weapons. Those are holdings, findings, decisions
11 by courts. Whether it's from *Heller*, whether it's from *Fyock*,
12 whether it's from *McDougall*, all of these cases point to the
13 fact that these magazines and the firearms utilized with them
14 are in commonplace, in common use. They're not quote/unquote
11:38:19 15 "military." They're not dangerous. They're not unusual. They
16 are commonplace magazines and firearms that have been defined as
17 firearms by these cases, and that comes both from *Heller*, and it
18 comes from *Fyock*.

19 Fundamentally deciding that these types of magazines are
11:38:39 20 prohibited because they're dangerous, that was an arbitrary
21 decision by our legislature. Again, if they're really concerned
22 about safety, it seems that there are plenty of other things
23 that could be regulated.

24 Threefold -- or three times the amount of deaths from
11:38:58 25 vehicles as opposed to homicides due to handguns -- which,

23

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1 again, I want to be very clear there, did not address caliber or
2 magazine style. Simply stated, it was lump summed into -- and
3 this is the 2019 data that we've cited in our motion for
4 preliminary injunction -- 179 deaths. There were 114 flu deaths
11:39:25 5 that same year; 150 cancer deaths. I'm not trying to belittle
6 anyone that's been harmed or killed due to a firearm, but the
7 same legislature turned a blind eye to 1789 drug deaths and made
8 that more accessible to the people.

9 So we don't have a problem here with magazines that hold
11:39:50 10 more than 10 rounds. We have a problem here of people that
11 misuse, that don't use for the constitutional purposes for
12 protection of oneself and one's state these firearms. And so
13 fundamentally we're here to ensure that these rights for those
14 who are going to utilize these magazines for constitutionally
11:40:12 15 protected purposes are not infringed nor impaired.

16 And that's what we're asking you to do with the
17 preliminary injunction today; by enjoining this, allow proper
18 gun-owning, gun-purchasing, and magazine-purchasing individuals
19 the ability to do so and exercise their United States and
11:40:34 20 Washington constitutionally protected rights.

21 So that's why we're asking for an injunction here. We
22 believe that harm has been done by prohibiting any sales,
23 distribution, or offering for sales or manufacturing of these.
24 Whether it's Mr. Brumback, whether it's Mr. Gilroy, Gimme Guns,
11:40:54 25 individuals' rights have already been infringed or impaired.

24

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1 It's happened, and the only way to make it right is to enjoin
2 that type of activity.

3 So we're asking for a preliminary injunction for further
4 discovery, for further briefing. I know one of the State's
11:41:11 5 experts -- again, I think it was Mr. Cornell -- indicated that
6 it might take six to nine months to write a sufficient brief on
7 the historical analysis. If that's what it takes, that's what
8 it takes. We ought to take this as a very serious question,
9 because any infringement of a constitutional right is a serious
11:41:29 10 question.

11 And so we ask that you grant this preliminary injunction
12 and enjoin any enforcement of Senate Bill 5078 and its impacts
13 on Revised Code of Washington 9.41.010 as well as .370 and .375.

14 Do you have any further questions, Your Honor?

11:41:48 15 THE COURT: I do not at this time.

16 MR. SERRANO: Okay. Thank you.

17 THE COURT: Thank you, Mr. Serrano.

18 All right. Ms. Simpson on behalf of the State
19 defendants.

11:42:03 20 MS. SIMPSON: Thank you.

21 May it please the court, July Simpson on behalf of the
22 Washington State defendants.

23 We woke up this morning to another mass shooting, this
24 time at a Walmart in Chesapeake, Virginia. Earlier this week it
11:42:11 25 was a bar --

25

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1 (Interruption by court reporter)

2 THE COURT: Ms. Simpson, we're gonna need you to slow
3 down substantially for the court reporter, please.

4 (Court reporter replied)

11:42:37 5 THE COURT: Ms. Simpson, when we're operating through
6 video, it can be more difficult for the court reporter to take
7 down what you're saying. So if you could just slow down,
8 please, for Ms. McMartin, we'd appreciate it.

9 MS. SIMPSON: Yes, of course. My apologies.

11:42:50 10 THE COURT: Thank you.

11 MS. SIMPSON: We woke up this morning to another mass
12 shooting, and this time it was at a Walmart in Chesapeake,
13 Virginia; and earlier this week it was at a bar in Colorado
14 Springs. In fact, in the past seven days, there have been seven
11:43:12 15 mass shootings. And since the 9/11 terrorist attacks, the 10
16 deadliest acts of criminal violence are all mass shootings
17 involving large-capacity magazines, and this is no coincidence.

18 Large-capacity magazines are firearm accessories
19 uniquely designed to enable shooters to kill as many people as
11:43:33 20 possible. They are also, like mass shootings, unique to our
21 time. They only became popular in the late aughts when
22 manufacturers made a concerted effort to market them to
23 civilians as tactical accessories, and the rise in popularity
24 has contributed to the rise in mass shootings from Sandy Hook to
11:43:53 25 Orlando to Las Vegas to Uvalde.

26

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1 And it's to prevent these kinds of tragedies that the
2 Washington legislature made a decision to regulate this one
3 particular type of firearm accessory that has an outsized role
4 in increasing the lethality of mass shooting events.

11:44:13

5 Plaintiffs have not met a single one of the *Winter*
6 factors, and they have to meet all of them to obtain the
7 extraordinary remedy of a preliminary injunction. This court
8 should deny the plaintiffs' motion.

11:44:26

9 I'd like to focus on three main points today. First,
10 the plaintiffs cannot succeed on the merits of this case because
11 large-capacity magazines are not arms protected by the Second
12 Amendment. They're military accessories that are most useful in
13 military service and not useful in self-defense.

11:44:45

14 Second, the United States has a robust historical
15 tradition of regulating weapons after they become associated
16 with interpersonal violence.

17 And, third, plaintiffs face no irreparable harm while
18 this litigation is pending.

11:45:00

19 Turning to my first point, plaintiffs fail initially to
20 establish that large-capacity magazines are arms under the
21 Second Amendment, because large-capacity magazines are firearm
22 accessories not necessary to the functioning of a firearm and
23 because they are most useful in military service. Large-capacity
24 magazines are just like silencers, scopes, bump stocks, or
25 barrel shrouds.

11:45:20

27

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1 The declaration of Ryan Busse makes clear that any
2 firearm that's capable of accepting a large-capacity magazine is
3 also capable of fully functioning with a smaller magazine, and
4 this is undisputed by the plaintiffs.

11:45:35 5 A good example of the -- sort of a part versus an
6 accessory contrast is a stock versus a bump stock. While a
7 stock may -- is necessary for certain firearms to function, a
8 bump stock is an accessory that increases the lethality of a
9 gun, and it's not necessary to the functioning of that gun. A
11:45:56 10 large-capacity magazine is, similarly, a military-style
11 accessory that increases the lethality of a gun, making it
12 easier to kill multiple targets quickly.

13 This court can deny the motion solely based on this;
14 but, additionally, the Second Amendment doesn't protect weapons
11:46:15 15 that are useful in military service. *Heller* holds that the
16 Second Amendment is not a right to keep and carry any weapon
17 whatsoever, and plaintiffs conceded this in their argument
18 earlier. Specifically, *Heller* also states that weapons most
19 useful in military service are not protected by the Second
11:46:33 20 Amendment.

21 Large-capacity magazines are designed to enhance a
22 shooter's capacity to shoot multiple human targets rapidly.
23 This is a military feature as demonstrated by the ATF findings
24 that we cite to in our brief as well as in the declaration of
11:46:51 25 Chief Diaz, none of which has been controverted by -- none of

1 this evidence is controverted by the plaintiffs.

2 The Klarevas declaration, which is also uncontroverted,
3 states that large-capacity magazines are force multipliers when
4 it comes to kill potential.

11:47:08 5 Further, again, regarding -- turning to the declaration
6 of Chief Diaz, large-capacity magazines have little to no use in
7 genuine self-defense. When we're talking about genuine
8 self-defense, we're talking about driving away an attacker, and
9 plaintiffs have put forth zero evidence of actual use in
11:47:28 10 self-defense.

11 Here, again, none of this evidence has been disputed by
12 the plaintiffs. The plaintiffs only argue that there's a lot of
13 large-capacity magazines, but this isn't enough to meet their
14 burden.

11:47:41 15 The en banc panel in the Fourth Circuit in the *Kolbe*
16 case rejected a commonality test in favor of *Heller's* clearer
17 most useful in military service standard. And the court can and
18 should apply the military service standard, and there's no need
19 to separately decide whether large-capacity magazines are in
11:47:59 20 common use for self-defense as *Kolbe* did. But even if there
21 were some sort of common use test, again, we're looking at
22 common use for self-defense, not whether or not there's a lot of
23 large-capacity magazines in the US.

24 Plaintiffs, again, they provide zero evidence that there
11:48:18 25 is any usage of large-capacity magazines in self-defensive

1 situations; and, in fact, there's actually more people living in
2 the US who are under a large-capacity magazine restriction than
3 there are people who own large-capacity magazines according to
4 the statistic that plaintiffs cite to in their complaint, which
11:48:38 5 we do not concede is accurate. However, even if it were, there
6 are more people living under large-capacity magazine
7 restriction.

8 Further, the uncontroverted testimony of the State
9 expert Lucy Allen shows large-capacity magazines are not
11:48:55 10 necessary, because the average number of shots fired in a
11 defensive situation is 2.2 and often no shots are fired.

12 Further, the uncontroverted testimony of Chief Diaz is
13 it only takes a few shots to drive away an aggressor, and,
14 again, that's the court -- that's when we're looking at true
11:49:14 15 self-defense is driving away an aggressor. And, in fact, he
16 stated that he would question whether or not it's true
17 self-defense if more rounds were fired than a few.

18 Thus, further, you know, finding that large-capacity
19 magazines are in common use just because there's a lot of them
11:49:30 20 would -- frankly, it would allow the gun industry to control and
21 dictate what is constitutional under the Second Amendment, and
22 that's not how the Second Amendment works.

23 Imagine, just for example, if bump stocks had been
24 marketed as heavily as assault weapons and large-capacity
11:49:48 25 magazines were by the gun industry before the Las Vegas shooting

1 and before the subsequent banning of that technology.

2 And, finally, regarding the common use test, Judge
3 Easterbrook in the *Friedman* case points out just how circular
4 this test is. Tommy guns were actually very common before they
11:50:06 5 were regulated and then ultimately banned; and now, because
6 they're banned, they're uncommon.

7 And, finally, on this point, Counsel referred repeatedly
8 to the *Fyock v. Sunnyvale* case, and it's important to note that
9 that case doesn't actually help them; and, additionally, it's
11:50:21 10 not binding precedent where he cites to the Southern District
11 case as opposed to the Ninth Circuit case. He's, frankly,
12 citing to the wrong opinion.

13 There, the Ninth Circuit upheld a denial of the PI, and
14 it didn't weigh in on the merits, and it also declined to find
11:50:37 15 that large-capacity magazines are common. It merely stated that
16 there has to be some sort of corollary right, albeit not
17 unfettered, to possess the magazines that are necessary to
18 render firearms operable.

19 And here, Washington's law does not affect the large
11:50:55 20 magazines that are necessary to render firearms operable. All
21 it does is it limits large-capacity magazines that are not
22 necessary to make the firearms operable. And, frankly, there's
23 no Ninth Circuit test or case that has held that large-capacity
24 magazines are arms.

11:51:17 25 Based on this, the plaintiffs have failed to meet their

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1 burden of showing that large-capacity magazines are arms under
2 that first initial inquiry under *Bruen* where we're looking at
3 the text of the Second Amendment. And based on this alone, the
4 court can deny the plaintiffs' motion.

11:51:33 5 But there's also the additional basis that the State has
6 put forth ample and undisputed evidence that there is a
7 historical tradition of regulating firearms and weapons in a
8 manner that addresses criminal violence without burdening the
9 right of self-defense.

11:51:50 10 At this stage, it is still the plaintiffs' burden to
11 establish a likelihood of success on the merits. And by failing
12 to even engage in any of the three declarations set forth by the
13 three experts that the State defendants have put forth, the
14 plaintiffs fail to meet their burden.

11:52:08 15 Instead, the plaintiffs wrongly argue that the only
16 tradition put forth is the assault weapons ban of 1994. But
17 then in their brief they cite to something that actually isn't
18 even in that bill, and they completely ignore our experts'
19 historical analysis from reconstruction onward, and they ignored
11:52:27 20 that again today in their oral argument.

21 *Bruen* actually spoke approvingly of this era, this time
22 after the adoption of the Fourteenth Amendment, and the
23 plaintiffs completely ignored the three experts' showing of this
24 pattern and tradition throughout time of this sort of three-step
11:52:45 25 test where initially a firearm, you know, is invented. It

1 takes, you know, perhaps several decades for, you know, for that
2 technology to be adopted. And once it starts to sort of
3 saturate the civilian population, that's when it begins to start
4 to cause harm, and that's when states start to regulate those
11:53:08 5 firearms.

6 And, you know, the plaintiffs' reply brief and argument
7 today really sort of demonstrates that they fundamentally
8 misunderstand the analysis required under *Bruen* by arguing that
9 there's no tradition of regulating large-capacity magazines
11:53:24 10 because it's a new technology.

11 But, as *Bruen* says, we're not looking for a historical
12 twin. What we're looking for is a comparable burden on the
13 right of self-defense and whether or not that burden is
14 comparably justified.

11:53:38 15 And here the State has submitted declarations from three
16 different historians showing a historical pattern in the United
17 States of regulating weapons in a manner that addresses criminal
18 violence without burdening the right of self-defense.

19 And large-capacity magazines follow this pattern. It's
11:53:58 20 a narrow limitation on a particular type of hardware that's
21 associated with high-profile violence, with a limited, if any,
22 burden on self-defense. And based on this alone, the plaintiff
23 [sic] can and should deny the plaintiffs' motion for preliminary
24 injunction.

11:54:13 25 But, turning to my third point, another reason to deny

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1 the plaintiffs' motion is that they fail to establish any kind
2 of irreparable harm. The Second Amendment is a right to keep
3 and bear arms for self-defense. It's not the right to keep and
4 bear any arms for whatever purpose or to purchase as many
11:54:32 5 firearms or large-capacity magazines as an individual can
6 possibly afford.

7 Here, Brumback already owns multiple large-capacity
8 magazines and firearms, and all of those remain unaffected by
9 this law. He can use any of these guns for self-defense while
11:54:48 10 this litigation is pending.

11 And regarding Plaintiff Gimme Guns, as Your Honor
12 pointed out, they only show a monetary damage which is not
13 irreparable; and, further, the *Teixeira* Ninth Circuit case holds
14 there is no independent right to sell firearms. Plaintiffs
11:55:08 15 quote in their reply and quote today to the wrong opinion under
16 the *Teixeira* case, but the Ninth Circuit has specifically said
17 there is no independent right to sell firearms.

18 And, you know, plaintiffs' own actions show that they're
19 not being irreparably harmed. The plaintiffs waited several
11:55:28 20 months after this law went into effect to file their case and to
21 bring their motion, and this lack of urgency really connotes an
22 absence of irreparable harm.

23 And, finally, specifically regarding their
24 constitutional harm, this argument really falls flat because
11:55:48 25 they haven't established a constitutional harm, as we've argued,

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1 because they're not likely to prevail on the merits. And
2 certainly there's no constitutional right to have more
3 large-capacity magazines than you could possibly need for
4 self-defense.

11:56:04 5 And the three cases that, you know, that counsel cites
6 to today -- you know, *Fyock*, the district court opinion;
7 *McDougall*, that was vacated for an en banc hearing before the
8 Ninth Circuit; and *Jones v. Bonta*, that was vacated for a
9 rehearing -- their three best cases in support of their argument
11:56:23 10 today, none of those are good law.

11 And just finally, briefly, Your Honor, I'd like to just
12 briefly address the balance of equities and public interest.
13 The plaintiffs fail this factor as well, and it's yet another
14 basis to deny their motion.

11:56:41 15 This law addresses a threat to public health and safety,
16 and the evidence put forth in our declarations shows the
17 large-capacity magazine regulations are effective. States that
18 have a large-capacity magazine regulation have a 50 percent
19 decrease in gun massacres. They also have a 60 percent decrease
11:57:04 20 in gun massacre fatality rates.

21 And, again, their argument that they're protecting a
22 constitutional harm falls flat where they fail to establish a
23 constitutional injury; and, again, their asserted injury of not
24 being able to buy or sell unlimited large-capacity magazines, it
11:57:24 25 pales in comparison to the public safety interests of

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1 Washingtonians that the legislature is seeking to protect by
2 passing this law.

3 To conclude, Washington's law regulates one particular
4 type of firearm accessory that vastly increases the lethality of
11:57:43 5 mass shooting events. Plaintiffs fail to meet any of the *Winter*
6 factors, and this court should deny the plaintiffs' motion for
7 preliminary injunction.

8 THE COURT: Thank you, Ms. Simpson.

9 MS. SIMPSON: Thank you.

11:58:01 10 THE COURT: All right. Ms. Castillo, do you want to be
11 heard today?

12 MS. CASTILLO: No, Your Honor.

13 THE COURT: All right. Mr. -- is it Mr. Pekelis? Am I
14 saying that right?

11:58:13 15 MR. PEKELIS: You said it perfectly, Your Honor. Thank
16 you.

17 THE COURT: All right.

18 MR. PEKELIS: Zach Pekelis for Alliance for Gun
19 Responsibility.

11:58:21 20 I'd like to begin at the legal standard that the court
21 must apply under *Bruen*. And mindful that Ms. Simpson has
22 already addressed many of the points that we've briefed, I'll
23 try not to be duplicative.

24 So the legal standard is this: When the Second
11:58:34 25 Amendment's plain text covers an individual's conduct, the

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1 Constitution presumptively protects its conduct. The government
2 must then justify its regulation by demonstrating that it's
3 consistent with the nation's historical tradition of firearm
4 regulation.

11:58:48 5 And although *Bruen* doesn't describe that as a two-part
6 test, in practice it is another two-part test. And the
7 threshold inquiry is a textual one, where the plaintiff has the
8 burden to establish that the plain text of the Constitution, of
9 the Second Amendment -- and nothing else -- covers the
11:59:05 10 individual's conduct in light of the challenged law.

11 So as courts in this circuit have correctly identified,
12 the first step is for the court to determine whether the plain
13 text covers the individual's conduct. And to do that, the court
14 has to first identify and delineate the specific course of
11:59:26 15 conduct at issue, which in *Bruen* was carrying handguns publicly
16 for self-defense.

17 So in that case it was undisputed that handguns were, of
18 course, arms protected by the Second Amendment. The question
19 was the extent to which carrying was protected by the Second
11:59:42 20 Amendment, and that -- of course, carrying, bearing arms is
21 textually supported in the Second Amendment. So the textual
22 inquiry in *Bruen* was not as meaningful as it is in this case
23 where, first of all, you have the common use question that
24 Ms. Simpson explored.

11:59:58 25 And then what I'd like to address today is just whether

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1 LCMs are even arms at all. And I think it's important to note
2 like what LCMs really are, what an external, detachable magazine
3 really is. It's a metal box that holds cartridges, which is a
4 collection of -- cartridges are rounds.

12:00:21 5 It's not the same as a clip. A clip, Your Honor, is
6 something that goes into a magazine, although in the popular
7 lexicon those two terms are sometimes used interchangeably. The
8 clip actually contains the bullets, or rounds, and that's
9 inserted into a magazine, which is a reusable metal box.

12:00:39 10 It rarely wears out, as Ms. Simpson noted, and it's easy
11 to refurbish if necessary although, again, it's very unusual.
12 You'd have to be an extremely frequent shooter in order to wear
13 out your magazines.

14 So it's also important to note that not all firearms
12:00:56 15 even use external, detachable magazines. For example, hunting
16 rifles, revolvers, shotguns, those typically do not involve
17 external, detachable magazines. And, as Ms. Simpson noted, no
18 firearm requires large-capacity magazines to operate, and they
19 accept all magazines regardless of size.

12:01:21 20 So in light of that, in light of what magazines actually
21 are, the question is whether magazines are arms. In *Heller* the
22 court defined arms as weapons of offense or armor of defense,
23 and it's clear that a large-capacity magazine is neither a
24 weapon of offense nor armor of defense.

12:01:42 25 It's an accessory, as Ms. Simpson has explained, and

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1 there's caselaw establishing that accessories, like silencers,
2 are not protectable weapons under the Second Amendment. That's
3 the Cox case from the Tenth Circuit.

4 And what they said in Cox was a silencer is a firearm
12:02:03 5 accessory. It's not a weapon in itself nor is it armor of
6 defense. Accordingly, it can't be a bearable arm protected by
7 the Second Amendment. Like silencers, lasers, bump stocks,
8 et cetera, LCMs are accessories, not protected arms.

9 And Ms. Simpson's also correct that there's no circuit
12:02:26 10 precedent, whether *Fyock* nor *Jackson*, that precludes holding
11 that large-capacity magazines are not protectable arms. In
12 *Fyock*, again, the court didn't address this issue at all. It
13 expressly bypassed the historical analysis step and assumed
14 without deciding that the city's large-capacity magazine
12:02:48 15 restriction burdened the Second Amendment.

16 And *Jackson* didn't involve large-capacity magazines at
17 all. It involved hollow-pointed bullets, a type of ammunition
18 directly. And the court reasoned, not based on the text of the
19 Second Amendment, didn't rely on -- didn't ask whether
12:03:06 20 hollow-tipped bullets were actually arms. It took sort of a
21 penumbral approach and reasoned that, well, the right to possess
22 firearms for protection implies a corresponding right to obtain
23 the bullets necessary to use them.

24 But that's not what *Bruen* instructs the courts to do.
12:03:25 25 The textual question is whether the plain text -- not some

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1 implication or penumbra -- whether the plain text protects the
2 conduct in question.

3 So *Jackson* went too far with respect to hollow-tipped
4 bullets, and certainly that reasoning shouldn't apply to an
12:03:43 5 entirely different question of whether the plain text covers
6 large-capacity magazines or other accessories.

7 And I'd point the court to a decision not cited in the
8 briefs but which contains a very helpful discussion of exactly
9 that textual versus penumbral point, and it's *Defense*
12:04:00 10 *Distributed v. Bonta* out of the Central District of California
11 this year, 2022, Westlaw 15524977.

12 In that case it rejected the plaintiffs' argument that
13 the right to keep and bear arms implicitly includes a right to
14 manufacture arms at home because that was not part of the plain
12:04:24 15 text -- "manufacture," that is, was not part of the plain text.

16 So I'd like to leave the textual point, the threshold
17 question, and turn to the history, and the question here is
18 whether the law is consistent with the nation's historical
19 tradition of firearm regulation.

12:04:42 20 And, you know, the key things to remember, the key
21 guideposts that *Bruen* gave the lower courts are that the modern
22 regulation need not be a dead ringer for historical precursors.
23 It's well-established -- it's looking only for a well-established
24 and representative historical analogue, not a historical twin,
12:05:01 25 and the laws need be relevantly similar, which means that they

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1 impose a comparable burden on the exercise of the right to bear
2 arms that is comparably justified by social interests.

3 So Mr. Serrano was wrong that the defendants and the
4 intervenor-defendant have relied solely on 20th century
12:05:21 5 evidence. We've cited evidence from the 18th century in terms
6 of regulations on trap guns and knives; we've cited evidence
7 from the 18th -- excuse me -- from the 19th century, pistols and
8 revolvers were regulated; as well as the early 20th century,
9 machine guns. So those are all relevant to the court's inquiry,
12:05:40 10 and it's incorrect that *Bruen* prohibits inquiry into post-Second
11 Amendment ratification history.

12 *Heller*, in fact, which first discerned and delineated
13 the individual right to bear arms, looked at laws from all of
14 those time periods -- 18th century, 19th century, and 20th
12:06:01 15 century -- in understanding the scope of the Second Amendment
16 right.

17 And *Bruen* looked at the 18th and 19th century laws as
18 well. What *Bruen* said was not that 19th and 20th century laws
19 weren't relevant but that when they conflict with earlier
12:06:16 20 evidence from around the Second Amendment's ratification that
21 they have less value.

22 So we don't see a conflict here at all. In fact, all
23 three sources of laws -- 18th, 19th, and 20th century -- tell us
24 the same thing as a historical point, which is that when a new
12:06:32 25 technology, new firearm technology is developed and is

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1 widespread, becomes widespread and presents dangers to human
2 safety and health, legislatures historically have been free and
3 willing to regulate that new technology.

4 So I'd also want to say one more thing about the
12:06:52 5 relevant time period. *Bruen* acknowledged the ongoing scholarly
6 debate over whether courts should primarily rely on the
7 prevailing understanding of an individual right when the
8 Fourteenth Amendment was ratified in 1868 or whether the Second
9 Amendment was ratified in 1791.

12:07:11 10 And *Bruen* didn't weigh in on that important question,
11 but from a just doctrinal standpoint it certainly makes sense to
12 consider historical evidence from around 1868 after this
13 ratification of the Fourteenth Amendment, particularly when
14 those histories don't conflict.

12:07:31 15 And without getting too deep into the constitutional
16 doctrine, "jot-for-jot incorporation" is the term typically
17 ascribed to when the meaning of the Bill of Rights, as
18 originally understood, is the same as when it's incorporated
19 against the states.

12:07:50 20 And there was some debate as to whether jot-for-jot
21 incorporation was the correct doctrine. And since *Ramos v.*
22 *Louisiana* -- decided, I believe, in 2018 -- now we know. The
23 Supreme Court has held that, yes, jot-for-jot incorporation is
24 the rule; meaning that when a right is incorporated -- when an
12:08:08 25 original Bill of Rights right is incorporated against the states

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1 through the Fourteenth Amendment, it has the exact, same meaning
2 as it does against the federal government.

3 So the question then becomes is it the 1791 meaning or
4 is it the 1868 meaning, and the single article cited by *Bruen*
12:08:25 5 says it's the 1868 meaning. That article, cited by Justice
6 Thomas's majority opinion, Kurt Lash, speaking of the local
7 rights, it says: When the people adopted the Fourteenth
8 Amendment, they readopted the original Bill of Rights and did so
9 in a manner that invested those original 1791 texts with new
12:08:45 10 1868 meanings.

11 And although *Bruen* doesn't come down one way or the
12 other in that debate, as a logical matter, when you're thinking
13 about the people around the Fourteenth Amendment reincorporating
14 it, it makes much more sense that it would be a backwards
12:08:59 15 meaning rather than a -- incorporating the older 1789 meaning,
16 because there's been a whole new history, 60 years of -- 70
17 years of history that have developed in the intervening period.
18 And that's all I'll say about the constitutional doctrine.

19 Moving on to irreparable harm, unless the court has any
12:09:18 20 questions on the merits?

21 THE COURT: I do not.

22 MR. PEKELIS: So the plaintiffs are wrong that in the
23 Ninth Circuit there is a per se irreparable harm in
24 constitutional cases, and they're right that there is such a
12:09:30 25 thing in First Amendment cases. And that does come from *Elrod*

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1 *v. Burns*, but *Elrod* specifically says -- and they conveniently
2 omit this from their brief, plaintiffs do -- that it's the loss
3 of First Amendment freedoms constitutes an irreparable injury.

4 And this makes sense because the First Amendment has an
12:09:47 5 expressive and a dignitary interest attached to it. If you're
6 prevented from speaking, then it's almost by definition a
7 noncompensable harm; whereas with other types of rights, such as
8 a commerce clause violation or a contracts clause violation,
9 it's less clear how it's noncompensable or dignitary interest's
12:10:07 10 at stake.

11 So as Ms. Simpson mentioned, *McDougall v. City of*
12 *Ventura* is a Ninth Circuit case. It does hold, as plaintiffs
13 say, that any constitutional violation constitutes an
14 irreparable harm. The problem for plaintiffs is it was vacated
12:10:23 15 upon grant of rehearing en banc, so that is not good law.

16 And there is no good law from the Ninth Circuit, the
17 court of appeals, holding that non-First-Amendment-type rights
18 automatically connote an irreparable harm. In fact, the Ninth
19 Circuit has said just the opposite.

12:10:40 20 In *CuvIELLO v. City of Vallejo*, 944 F.3d 816, the Ninth
21 Circuit said while a colorable speech claim raises the specter
22 of irreparable harm, we must still examine the irreparable harm
23 factor independently. And so that's what this court must do as
24 well. I'd also point the court to a relatively recent District
12:11:03 25 of Oregon opinion that canvasses the caselaw, the Ninth Circuit

1 caselaw on this very issue, and that's *Great Northern v. Coba*,
2 2020, Westlaw 6820793.

3 So what are the other irreparable harm injuries that
4 plaintiffs posit beyond the per se constitutional theory? The
12:11:26 5 first is easy to dismiss. That's Gimme Guns's monetary
6 injury -- alleged monetary injury, I should say, as the court
7 correctly pointed out. Almost by definition, a monetary injury
8 is not irreparable because it is compensable in damages.

9 I couldn't quite understand what plaintiffs meant when
12:11:43 10 they said that there's some sort of separate inability to sell
11 injury, but I agree with Ms. Simpson that that is, you know,
12 foreclosed by *Teixeira*. There's not an individual right to sell
13 firearms under the Second Amendment.

14 I also heard plaintiff say something to the effect that
12:12:00 15 it isn't just LCMs that Gimme Guns is prevented from selling but
16 also other types of firearms, presumably some sort of rifle that
17 comes with LCMs. And that's just not in the record, and the
18 court should disregard that.

19 It's, in fact, contrary to everything in the record
12:12:16 20 which shows that large-capacity magazines, while they do come
21 standard on some firearms, there's always or almost always an
22 option to have a smaller capacity magazine, a 10-round magazine
23 instead. So that's simply not part of the record. Gimme Guns
24 has no irreparable injury here.

12:12:35 25 It comes down to Brumback, who said that he owns

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1 multiple -- excuse me -- several large-capacity magazines, so we
2 can assume three or more, and that he's also -- it also
3 establishes that he's built guns or manufactured guns or
4 repaired guns, so we can presume that Mr. Brumback is certainly
5 capable of repairing any magazines that develop any wear.

6 So as the Busse declaration establishes, it's very easy
7 to repair magazines that wear down, and such wear is extremely
8 unusual to the point where they wouldn't function. So the
9 question is: Does Mr. Brumback have an irreparable harm in not
10 being able to buy more than the at least three LCMs that he
11 already owns?

12 And the answer to that clearly is no, because we know
13 that there's been two instances, perhaps, of using more than
14 10 bullets in self-defense out of thousands, tens of thousands
15 of potential inquiries that expert witness Lucy Allen has
16 discerned. That represents .3 percent of the NRA's own
17 database.

18 And it's also noteworthy that those two instances come
19 from the NRA's self-reported database which, of course, has an
20 interest in, in promoting using a lot of bullets in self-defense,
21 using a lot of rounds in self-defense. And the other database
22 that's noteworthy, there's zero instances of using more than
23 10 rounds in self-defense.

24 So there's, there's an infinitesimally small chance that
25 Mr. Brumback would actually need one large-capacity magazine to

1 engage in lawful self-defense, let alone more than the three he
2 already owns.

3 I'd also point out that nothing prevents Mr. Brumback
4 from buying 10-round magazines, as many as he wants, or other
12:14:33 5 weapons, other firearms which he can load with either his -- the
6 LCMs that he owns or new 10-round magazines that he wishes to buy.

7 So it's just unfathomable that Mr. Brumback, as a
8 practical matter, as a realistic matter, would suffer any
9 injury, let alone an irreparable injury from not being able to
12:14:51 10 purchase new large-capacity magazines between now and the time
11 that this litigation concludes.

12 Finally, in the balance of equities, Mr. Brumback's
13 minimal interests pale in comparison to the public's interests
14 in reducing gun violence through this very targeted commonsense
12:15:09 15 measure of restricting purchase of large-capacity magazines.

16 The overwhelming evidence, as Ms. Simpson indicated, is
17 that the large-capacity magazine restriction in Washington will
18 be effective. We know that they are used in 60 percent of mass
19 shootings where magazine capacity is known, including the 11
12:15:31 20 deadliest shootings including Vegas, Orlando, and Uvalde.

21 And it's no mystery why large-capacity magazines -- this
22 isn't like some anomalous statistic. It's common sense. We
23 know that large-capacity magazines enable the shooter to fire
24 more bullets in a shorter period of time and that that longer
12:15:51 25 period of time not only causes more injuries, more bullets being

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1 actually shot, but it deprives the victims and bystanders of
2 that crucial pause period where the, where the shooter has to
3 reload -- which can take several seconds -- giving them an
4 opportunity either to escape, to flee, or to disarm or intervene
12:16:10 5 against the attacker, as happened in the Colorado Springs
6 shooting tragically last week where an individual intervened.

7 So in the 12 states that have adopted large-capacity
8 magazine restrictions, we've seen the benefits of a 50 percent
9 decrease in gun massacres, and Washington should be entitled to
12:16:35 10 reap the benefits of that, of that regulation as well.

11 I'll just conclude by saying that this isn't just about
12 the raw abstract statistics. These are real shootings, real
13 massacres, real victims, and impose real trauma on their
14 communities.

12:16:54 15 Since the briefing in this case closed just a few weeks
16 ago, November 7, 18 mass shootings have occurred in the United
17 States, including at the University of Virginia, in Colorado
18 Springs, and, most tragically, last night in Chesapeake,
19 Virginia, at a Walmart. And that comes from the gun violence
12:17:11 20 statistics authority.

21 So the question is not if there's going to be another
22 mass shooting but when and where, and the people of Washington
23 have a powerful interest in making sure that the next mass
24 shooter, if he strikes here, will not be able to just go out and
12:17:28 25 purchase a 30-, 50-, or a 100-round magazine at his local gun

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1 shop. It's a modest, commonsense measure, this law, that
2 reduces the risk of mass murder, gives victims a fighting chance
3 to escape or intervene, and saves lives.

4 If the court has no further questions, we ask -- we join
12:17:47 5 the State in asking that the court deny the motion for
6 preliminary injunction.

7 THE COURT: Thank you, Mr. Pekelis.

8 Mr. Serrano.

9 MR. SERRANO: Thank you, Your Honor.

12:18:00 10 I'm gonna pick up where Mr. Pekelis left off. Here he's
11 citing to the fact that in the event that another mass shooting
12 occurs, that person will presumably or invariably utilize these
13 types of magazines.

14 I'd like to point to the inverse of that, which is
12:18:22 15 Mr. McKnight's declaration which we filed with our complaint.
16 It was supposed to be -- it would have been, I think, labeled
17 like 1-10, but I think it's now ECF No. 35.

18 And in this Mr. McKnight, you know, painstakingly goes
19 through what it would take for someone on the defensive side to
12:18:43 20 reload. He talks about individuals who are highly trained and
21 capable, that it would require for them to utilize -- you know,
22 express all the bullets in their magazine and then to reload, it
23 could take up to 15 or 20 seconds. These are highly trained
24 individuals. And that's when you calculate out, you know, the
12:19:01 25 adrenaline, all the other emotions and everything that occurs

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1 when this type of attack occurs. We've seen individuals who've
2 been able to stop mass shootings earlier this year in the mall
3 and I believe in Indiana because of their ability to utilize
4 guns properly.

12:19:20 5 So this isn't just about the mass shootings. That's,
6 that's a misstatement. The Constitution protects the individual
7 right to bear his or her arms in defense of him or herself or,
8 in the federal component, as a part of -- as a well-regulated
9 militia, to protect the state interests.

12:19:43 10 I'd also like to address the irreparable harm. Now, I
11 recognize that *Jones v. Bonta* is one of the many, many cases
12 that in light of *Bruen* has been vacated. I, obviously, offer
13 that. But it's very clear, the district court also erred in its
14 analysis of the irreparable harm preliminary injunction factor,
12:20:04 15 period. The deprivation of constitutional rights unquestionably
16 constitutes irreparable injury.

17 *Jones v. Bonta* is a gun rights case. This is the
18 text -- this is the context that they're utilizing this
19 statement in. The district court offered three rationales that
12:20:22 20 fail. First, the district court erred in holding that there was
21 no irreparable harm, because young adults could still obtain
22 firearms under exception. As we discussed above, the exceptions
23 do not alleviate the ban's severe burden on the Second Amendment
24 rights. They do not allow the plaintiffs to avoid irreparable
12:20:41 25 harm for the same reasons.

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1 Here, when there's a blanket prohibition on a type of
2 arms which both *Heller* and *Fyock* have addressed -- and I
3 understand that these cases, *Fyock* has been overturned, but the
4 circuit court -- or -- yeah -- the circuit court did not address
12:21:02 5 the merits of the case. It overturned. It did not address --
6 as I believe it was Mr. Jones indicated, it kind of bypassed
7 that analysis. So when *Fyock* holds that these magazines are
8 arms, when *Heller* holds that these magazines are arms, you know,
9 that's what we have to go on.

12:21:19 10 I'd also like to note that in *Miller v. Bonta*,
11 addressing what Ms. Simpson said, one is to be forgiven if one
12 is persuaded by news media and others that the nation is awash
13 with murderous AR/assault rifles. The facts, however, do not
14 support this hyperbole, and the facts matter.

12:21:40 15 Federal Bureau of Investigation murder statistics do not
16 attract -- do not track assault rifles, but they do show that
17 killing by knife attack is far more common than murder by any
18 kind of rifle. In California, murder by knife occurs seven
19 times more often than murder by rifle.

12:21:58 20 According to the FBI statistics, California saw 252
21 people murdered with a knife while 34 were killed with some type
22 of rifle, not necessarily an AR-15. A Californian is three
23 times more likely to be murdered by an attacker's bare hands,
24 fists, or feet than by his rifle.

12:22:17 25 I understand we're not in California, and I understand

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1 these mass shootings that the legislature has attempted to
2 cease, allegedly, through this, through Senate Bill 5078, I
3 understand that that's presumably the intent here.

4 Nonetheless, individual rights -- like Mr. Brumback,
12:22:37 5 whether he owns and possesses these magazines, they can fail.
6 They can wear out. And whether or not they're the clip or the
7 magazine, they're certainly not silencers. They're certainly
8 not scopes. You know, those are things that allow an individual
9 to either hide what they're able to do or to see from afar.

12:23:01 10 These are the ability to feed ammunition into the tube, to fire
11 a projectile.

12 These are arms, and by limiting an individual like
13 Mr. Brumback, his ability to obtain them legally, or from
14 Mr. Gilroy/Gimme Guns' ability to sell them to desiring patrons,
12:23:27 15 Senate Bill 5078 has unquestionably infringed on individual
16 rights to bear arms in self-defense.

17 Do you have any further questions, Your Honor?

18 THE COURT: I do not.

19 MR. SERRANO: Okay. With that, thank you.

12:23:40 20 THE COURT: All right. I'll just check in and see if
21 anyone else has any follow-up at this point.

22 Ms. Castillo?

23 MS. CASTILLO: No, Your Honor.

24 THE COURT: All right. Ms. Simpson, anything further at
12:23:54 25 this time?

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1 MS. SIMPSON: Nothing further unless Your Honor has any
2 questions.

3 THE COURT: I do not.

4 Mr. Pekelis, anything further?

12:24:01 5 MR. PEKELIS: No, Your Honor.

6 THE COURT: All right. Thank you, folks, for making
7 yourselves available today, as Mr. Serrano noted, the day before
8 Thanksgiving. Your arguments have been very helpful. I
9 anticipate a ruling within approximately 30 days.

12:24:18 10 Is there anything else the parties would like me to take
11 up at this time?

12 Mr. Serrano?

13 MR. SERRANO: No, ma'am.

14 THE COURT: All right. Ms. Simpson?

12:24:28 15 MS. SIMPSON: No, Your Honor.

16 THE COURT: Ms. Castillo?

17 MS. CASTILLO: No, Your Honor.

18 THE COURT: And, Mr. Pekelis?

19 MR. PEKELIS: No, Your Honor.

12:24:41 20 THE COURT: All right. That concludes this hearing.
21 Thank you, folks.

22 Court's in recess.

23 THE COURTROOM DEPUTY: All rise.

24 Court is adjourned.

12:25:05 25 (Hearing concluded at 12:25 pm)

C E R T I F I C A T E

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